In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 519

LENWOOD DOWERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals affirming petitioner's conviction and five year sentence for narcotics offenses was entered on July 27, 1964. A petition for rehearing was denied on August 19, 1964. The petition for a writ of certiorari, filed on September 21, 1964, is out of time under Rule 22-2 of this Court. There is, moreover, no occasion for the Court to waive its rules; the petition presents no substantial or important issue.

The principal evidence against petitioner came from narcotics agent Jackson. As to Count 1, Jackson testified that, on the evening of March 14, 1962, in front of the house where petitioner had an apartment, he told petitioner that he had come to get another ounce of heroin. Petitioner said, "then you want to see that boy"; Jackson answered, "yes, I want to see Ike [Prior]." Petitioner and Jackson then went to petitioner's apartment (R. 5-6). There, petitioner telephoned Prior saying, "Ike that boy is here from Detroit and he want to talk with you. He want to get another thing [an ounce of heroin]." Petitioner handed the telephone receiver to Jackson and said, "Ike want to talk to you." Prior directed Jackson to meet him at midnight at State and Grand (R. 6-7). At this meeting, Jackson paid Prior $600 in advanced official funds and Prior set another meeting for the following evening at 10:30 p.m., at Grand and LaSalle Street (R. 8-9). At the ensuing meeting of March 15, Prior, after making a telephone call, told Jackson, "It shouldn't take long. Everything is about ready." At about 11:20 p.m. Prior turned into an alley, picked up an aluminum tinfoil package, and handed it to Jackson (R. 9). This package contained heroin for which there was no order form (R. 10-12, 54). The testimony of other government agents corroborated Jackson's testimony in regard to the acts of Jackson and Prior on March 15 (R. 37, 43-44).

On March 22, 1962, agent Jackson dialed petitioner's telephone number, employing a secretary in the

narcotics office to create the impression that he was making a long-distance call from Detroit (R. 13, 27). In this call, monitored by agents Taylor and Wanzeck (R. 44-47, 13), Jackson complained, "That last stuff I got from you was kind of bad, * * * and I had to get some more stuff to make it up, because the people have been screaming about it." Petitioner answered, "Well, you will have to talk with Ike about that." Jackson said, "Yes, that's what I intend to do. But the only way I can talk to him is through you, because I don't know his telephone number, and I don't know how to get in contact with him." Petitioner stated, "Well, I will tell him" (R. 13-14).

As to Count 2, agent Jackson testified that on April 2, 1962, at petitioner's apartment, petitioner telephoned Prior and said, "Ike, Larry is here from Detroit and he wants to talk to you." Petitioner handed the phone to Jackson who told Ike he wanted to get "another piece of stuff." A meeting was arranged at which Jackson asked whether Ike had talked with petitioner about the "bad stuff" and Ike said he had told him (R. 14-15). Jackson gave Prior $600 advanced official funds in an alley, and Prior instructed Jackson to meet him the following night. On April 3 at about 10:30 p.m., Prior picked up an aluminum tinfoil package and handed it to Jackson in an alley (R. 16).

In testifying on his own behalf, petitioner denied discussing narcotics or making any telephone calls to Prior for agent Jackson (R. 57). Petitioner denied receiving a telephone call from agent Jackson on March 22, 1962 (R. 68).

1. There is no substance to the contention that agent Jackson's testimony was unworthy of credence because of discrepancies in his testimony. At petitioner's trial Jackson testified that on March 14, 1962, in front of petitioner's apartment, he told petitioner that he wanted to buy another ounce of heroin (R. 5-6, 24). In an affidavit filed in response to an affidavit for a bill of particulars relating to the original indictment, Jackson stated that he told petitioner he wanted to "cop" again. This is not a real discrepancy. The agent explained (R. 24), "As I recall, I said, 'I want to cop another ounce of heroin.'"

At petitioner's trial Jackson testified, as to the monitored telephone call on March 22, 1962, that he personally dialed petitioner's number (R. 13, 27), and that agents Taylor and Wanzeck were in the same room with him (R. 13, 23). At the prior trial of Prior (R. 70) Jackson had testified that a secretary in the office dialed the number (R. 72), and that agent Wanzeck had an extension in the same room where Jackson was located, but that agent Taylor had an extension in another room (R. 71, 72). This discrepancy as to a minor matter does not show perjury.

2. Contrary to petitioner's contention (Pet. 8-10), the evidence was sufficient to show that he aided and abetted the illegal sales by Prior to agent Jackson. Petitioner served as an indispensable link in bringing Prior and Jackson together so that the sales could be consummated. It is evident that Prior wished to conceal his telephone number and location and there-

fore dealt through petitioner. The jury was amply warranted in finding that petitioner's actions brought about the sales to Jackson. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Perkins* v. *United States*, 315 F. 2d 120 (C.A. 9), certiorari denied, 375 U.S. 916; *Mays* v. *United States*, 261 F. 2d 662, 664-665 (C.A. 8); *United States* v. *Alexander*, 219 F. 2d 225, 226-227 (C.A. 7).

3. Since petitioner was charged with aiding and abetting sales, it was unquestionably proper for the government to prove the sales. The testimony of agent Jackson as what petitioner himself did (not what Prior said petitioner did) showed that petitioner and Prior were acting together pursuant to a common plan for selling narcotics. That being the case, co-defendant Prior's acts and declarations, even though made outside the presence of petitioner, were properly admissible against him as one of the parties engaged in the joint venture. Cf. *Wiborg* v. *United States*, 163 U.S. 632, 657-658; *United States* v. *Olweiss*, 138 F. 2d 798, 799-800 (C.A. 2), certiorari denied, 321 U.S. 744; *United States* v. *Perillo*, 164 F. 2d 645 (C.A. 2); *United States* v. *Bernard*, 287 F. 2d 715, 719-720 (C.A. 7), certiorari denied, 366 U.S. 961; *Cossack* v. *United States*, 82 F. 2d 214, 216 (C.A. 9), certiorari denied, 298 U.S. 654.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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